

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FLOYD S. SHAVERS,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DA07529110450

DATE: JAN 3 1992

Floyd S. Shavers, Memphis, Tennessee, pro se.

Yvette Chancellor, Esquire, Washington, D.C., for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that dismissed his petition for appeal as untimely filed. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the petition for appeal as untimely filed.

BACKGROUND

The appellant was removed from his EAS-23 Postal Inspector position effective March 20, 1991. See Initial Appeal File (IAF), Tabs 1 and 6, Subtab 4c. On April 10, 1991, he filed a petition for appeal with the Board's Dallas Regional Office. See IAF, Tab 1. Because the appeal appeared to be untimely filed, the administrative judge issued an April 22, 1991 acknowledgment order advising him to file evidence and argument that the appeal was timely filed or that good cause to excuse the delay existed. See IAF, Tab 2. When the administrative judge did not receive a response to the acknowledgment order, he issued a May 23, 1991 initial decision dismissing the appeal as untimely filed.

The appellant has filed a timely petition for review in which he asserts that he responded to the acknowledgment order by letter mailed May 7, 1991, and in the letter provided good cause for the untimely filing. See Petition For Review (PFR) File, Tab 1. The agency has timely responded to the petition for review. See PFR File, Tab 3.

ANALYSIS

The Board's regulatory time limit for appealing a removal action, such as in this case, is 20 days after the effective date of the action appealed. See 5 C.F.R. § 1201.22(b). There is no question that the petition for appeal was untimely filed 1 day after the April 9, 1991 filing deadline. See IAF, Tab 1; PFR File, Tab 1. The Board may waive its regulatory time limit for filing for good cause shown. To establish good

cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. See *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

The appellant alleges that he provided good cause for the delay by the May 7, 1991 letter. See PFR File, Tab 1. The record contains no evidence that the Dallas Regional Office received that letter. The agency, in its response to the petition for review, denies receiving a copy, even though the administrative judge's acknowledgment order instructed the appellant to serve the agency with a copy of any submission to the Board. See PFR File, Tab 3; IAF, Tab 2.

To substantiate his unsworn statement that he mailed the letter, the appellant has provided a copy of a Postal Service Form 3800 receipt for certified mail dated May 7, 1991, documenting that the material mailed was sent to "MSPB" at the address of the Dallas Regional Office. See PFR File, Tab 1. A filing properly addressed, stamped, and mailed is presumed to have been duly delivered. See *Pfaff v. Defense Investigative Service*, 25 M.S.P.R. 633, 636 (1985). However, the issue is not whether the Board received the filing, and therefore the "rebuttable presumption of delivery rule" does not apply. See *McDaniel v. U.S. Postal Service*, 43 M.S.P.R. 583, 587 (1990); *Younan v. Department of the Air Force*, 41 M.S.P.R. 217, 222 n.10 (1989). The issue is rather whether the appellant properly filed it. We find that his proof of mailing, i.e., his statement and the receipt for certified

mail, properly addressed to the Dallas Regional Office, is sufficient to show that he timely responded to the administrative judge's acknowledgment order. See *McDaniel*, 43 M.S.P.R. at 587. The fact that the agency did not receive a copy of the letter does not by itself establish that the appellant did not mail the letter to the administrative judge. But see *Schaefer v. U.S. Postal Service*, 42 M.S.P.R. 592, 595 (1989).

As for whether the appellant's statement provides good cause for the delay in filing his petition for appeal, the Board has held that, in the interest of judicial efficiency and fairness, the Board will not waive its timeliness requirements in the absence of good cause shown, regardless of how minimal the delay in filing. See *Goldberg v. Department of Defense*, 39 M.S.P.R. 515, 518 (1989). The appellant asserts that the delay was caused by his representative's failure to timely file the appeal despite the appellant's attempts to monitor his appeal. Generally, an appellant is responsible for the failures of his chosen representative. See *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). However, the Board has held that, in limited circumstances, in the interest of fairness an appellant should not be penalized when his representative thwarts his diligent efforts to prosecute his appeal. See *Dunbar v. Department of the Navy*, 43 M.S.P.R. 640, 642-45 (1990). In *Dunbar*, the appellant repeatedly telephoned his attorney's office to monitor the progress of his appeal and visited the office in an attempt to mail the

appeal himself. An employee of the attorney actively misled the appellant into believing that the appeal had been mailed. In contrast, the appellant in this appeal does not allege that his representative actively deceived him but rather asserts that his repeated attempts to contact his representative were unsuccessful. It was not until the April 9, 1991 filing date had passed that the appellant decided that his reliance on his representative was misplaced. An appellant's unwarranted belief that his representative is pursuing his appeal is not a proper basis for a finding of due diligence. See *Curry v. Department of the Navy*, 43 M.S.P.R. 645, 650 (1990). Under these circumstances, we find that the appellant has failed to show that he exercised the appropriate diligence in monitoring his appeal. See *Graham v. Department of the Army*, 47 M.S.P.R. 38, 40-41 (1991); *Bro v. U.S. Postal Service*, 46 M.S.P.R. 294, 296 (1990).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.